BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
	)	
Petition of AT&T for Forbearance Under 47 U.S.C. § 160 From Title II and Computer Inquiry Rules with Respect to its Broadband Services	)	
	)	
BellSouth Petition for Forbearance Under 47 U.S.C. § 160 From Title II and Computer Inquiry Rules with Respect to its Broadband Services	)	WC Dkt. No. 06-125
	)	
CompTel Petition for Declaratory Ruling	)	
	)	
Emergency Petition for a Declaratory Ruling of Time Warner Telecom Inc.	)	
	)	

REPLY COMMENTS OF TIME WARNER TELECOM

Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM INC.

January 11, 2008

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REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Inc. ("TWTC"), by its attorneys, hereby files reply comments in support of its petition for declaratory ruling and CompTel's similar petition for declaratory ruling filed in the above referenced docket.[1]

I. INTRODUCTION AND SUMMARY

When the FCC approved the merger between AT&T and BellSouth in December 2008,[2] Commissioner Copps pointed out, that it was "the largest telecommunications

[1] *See* Emergency Petition for a Declaratory Ruling of Time Warner Telecom Inc., WC Docket No. 06-125 (filed Nov. 21, 2007) ("*TWTC Petition*"); CompTel Petition for Declaratory Ruling, WC Dkt. No. 06-125 (filed Nov. 13. 2007).

[2] *See AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) ("*Merger Order*").

merger ever."[3] There were only four Commissioners at the time, two of whom (Chairman Martin and Commissioner Tate) had supported approval of the merger without conditions. In order to garner the majority required for approval, however, AT&T and BellSouth had needed to convince either Commissioner Copps or Commissioner Adelstein that the proposed merger was in the public interest. Yet both of those Commissioners concluded that conditions were necessary to address the threat to consumer welfare posed by the merger. The need for conditions was especially necessary "to rectify years of decisions that have undercut competition,"[4], and the Commission's past failure to comply with its "obligation to encourage the kind of fair competition necessary to protect consumers." *Copps Merger Order Statement* at 169. As Commissioner Copps explained, "[n]owhere" had "the FCC's folly in de-regulating without ensuring competition [been] more apparent than in the special access market." *Id*. at 173. Accordingly, in order to obtain Commissioner Copps' and Commissioner Adelstein's support, AT&T agreed to comply with a comprehensive set of Special Access Merger Conditions designed to "restore balance by reinstating price caps," prevent "anti-competitive contract conditions" and otherwise constrain AT&T's exercise of market power. *Id.*

At the time the Commission adopted the Special Access Merger Conditions, AT&T was subject to dominant carrier tariffing obligations for all of its special access service offerings. Commissioners Copps and Adelstein concluded, however, that such

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[3] *Merger Order*, Concurring Statement of Commissioner Michael J. Copps, at 169 ("*Copps Merger Order Statement*").

[4] *Merger Order,* Concurring Statement of Commissioner Jonathan S. Adelstein, at 175 ("*Adelstein Merger Order Statemen*t").

regulation was insufficient because it was "well-documented" that AT&T and BellSouth abused their market power in the provision of special access services, and the proposed merger made this problem even worse. *Id*. at 170. The Special Access Merger Conditions therefore expressly relied upon the continued application of tariffs and required that AT&T comply with additional regulations designed the make the existing regulatory framework more effective. Moreover, because Commissioners Copps and Adelstein knew that the Commission might well continue its "folly of de-regulating without ensuring competition" in future forbearance proceedings, the Merger Conditions state that AT&T may not "give effect to any future grant of forbearance that diminishes or supersedes" AT&T's obligations under the Merger Condition (hereinafter the "Forbearance Merger Condition").

Unfortunately, just as Commissioners Copps and Adelstein anticipated, AT&T is now trying to use a decision yielded by the obviously flawed forbearance process to avoid complying with the commitments it made in order to obtain approval of its merger with BellSouth. Relying on the FCC grant of forbearance with regard to business broadband special access service,[5] AT&T just this week filed with the FCC tariff transmittals which seek to withdraw its tariffs for Ethernet, OCn and other business broadband special access services.[6] Although this is precisely the type of action

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[5] *See Petition of AT&T Inc. for Forbearance and Petition of BellSouth Corporation for Forbearance*, Memorandum Opinion & Order, 22 FCC Rcd 18705, ¶ 2 (2007) ("*Forbearance Order*").

[6] *Ameritech Operating Cos., Revision, Tariff F.C.C. No. 2, Transmittal No. 1664* (filed Jan. 7, 2008); *BellSouth Telecommunications, Inc., Revision, Tariff F.C.C. No. 1, Transmittal No. 1119* (filed Jan. 7, 2008); *Nevada Bell Telephone Co., Revision, Tariff No. 1, Transmittal No. 174* (filed Jan. 7, 2008); *Pacific Bell Telephone Co., Revision, Tariff F.C.C. No. 1, Transmittal No. 383* (filed Jan. 7, 2008); *Southern New England Telephone Company, Revision, Tariff F.C.C. No. 39, Transmittal No. 963* (filed Jan. 7,

prohibited by the Forbearance Merger Condition, AT&T argues strenuously that the prohibition on giving effect to forbearance does not mean what it says.

AT&T asserts that CompTel's and TWTC's requests for a declaratory ruling prohibiting AT&T from withdrawing its tariffs are in fact untimely petitions for reconsideration of the *Forbearance Order* since CompTel and TWTC purportedly seek to change the "effective date" of that order. This is plainly wrong. The prohibition against giving effect to the *Forbearance Order* does not change the "effective date" of that order for purposes such as the deadline for filing appeals and reconsideration petitions. In any event, AT&T does not believe its own argument since it concedes that the Merger Conditions prevent it from giving effect on the "effective date" set forth in the *Forbearance Order* to at least some of the relief (e.g., the freedom from rate regulation) otherwise available under the non-dominant classification granted in that order.

AT&T also argues that the terms of the *Forbearance Order* unambiguously state that the Merger Conditions have no bearing on the relief otherwise available under the *Forbearance Order*. But that order expressly states that it "does not affect in any way" enforcement of the Merger Conditions. Given that Commissioner McDowell clarified that AT&T is not "relieved from existing tariffing" obligations until "the expiration of the voluntary merger conditions"[7] and Commissioners Adelstein and Copps voted against relieving AT&T of its tariffing obligations, a majority of the Commissioners agree that the *Forbearance Order* in no way permits AT&T to withdraw its tariffs until the expiration of the Merger Conditions.

2008); *Southwestern Bell Telephone Company, Revision, Tariff F.C.C. No. 73, Transmittal No. 3249* (filed Jan. 7, 2008).

[7] *Forbearance Order,* Separate Statement of Commissioner Robert M. McDowell, at 45 ("*McDowell Statement*").

AT&T next asserts, implausibly, that Commissioners Copps and Adelstein did not think that tariffs were a necessary underpinning of the Merger Conditions. But Commissioners Copps and Adelstein insisted on the Special Access Merger Conditions because past FCC regulation of AT&T's special access, which included dominant carrier tariff-filing requirements, was insufficient to constrain AT&T's market power. Tariffs form the very foundation of the further obligations established in the Merger Conditions. It is therefore fantasy to assert that Commissioners Copps and Adelstein considered tariffs unnecessary to enforce the Conditions.

AT&T argues that the purpose and logic of the *Merger Order* and the *Forbearance Order* justify eliminating tariffs. But the purpose of the Merger Conditions was to constrain AT&T's ability to exploit its control over "the only choice most companies have for business access services." *Copps Merger Order Statement* at 169. Indeed, Commissioners Copps and Adelstein both rejected the analysis of the market in the *Merger Order* as fatally flawed, and they insisted on conditions notwithstanding that analysis. Moreover, AT&T's own concession that it must comply with price limits in the Merger Conditions that are completely inconsistent with non-dominant classification shows that the purpose and logic of the *Forbearance Order* is irrelevant. Accordingly, the purpose of the Merger Conditions must control the analysis, and that purpose would be substantially frustrated without tariff filings. Without tariff filings, AT&T would be free to abuse its market power by engaging in price discrimination, including price squeeze tactics, and the imposition of unreasonable contract terms without detection.

In all events, the terms of the Special Access Merger Conditions on their face demonstrate that elimination of tariffs would diminish or supersede AT&T's obligations

under the Conditions. Many of the Special Access Conditions (including Conditions 2, 4, and 5) apply only to the services AT&T offers under tariffs, virtually none of them can be sufficiently enforced without tariffs, and even AT&T admits that one of them expressly requires that AT&T file tariffs. The Commission should therefore issue a declaratory ruling clarifying that the Merger Conditions prohibit AT&T from withdrawing its broadband business tariffs until the expiration of the Conditions. Moreover, the Commission must do so promptly given that AT&T has already filed notice of the withdrawal of its broadband business special access tariffs.

II. THE TWTC AND COMPTEL PETITIONS FOR DECLARATORY RULING ARE NOT UNTIMELY PETITIONS FOR RECONSIDERATION

AT&T argues that the petitions for declaratory ruling should be treated as untimely petitions for reconsideration of the *Forbearance Order*, because TWTC and CompTel purportedly seek to change the *Forbearance Order* by delaying its "effective date" until 2010.[8] But this is not so. The fact that the *Forbearance Order* "took effect" pursuant to its ordering clauses on October 11, 2007 has no bearing on whether AT&T may *give effect* to that forbearance and withdraw its tariffs. This is so for several obvious reasons.

First, AT&T's argument rests on the assumption that the date on which AT&T may "give effect" to the relief granted in the *Forbearance Order* is in all respects the same as the "effective date" set forth in the ordering clauses. This is incorrect. The effective date of the *Forbearance Order* serves several critical functions, such as starting the clock for filing petitions for review and reconsideration, that have nothing to do with

[8] *Opposition of AT&T Inc. to Petitions for Declaratory Ruling Filed by CompTel and Time Warner Telecom*, WC Dkt. No. 06-125, at 5 (filed Dec. 21, 2007) ("*AT&T Opposition*").

when AT&T may give effect to the relief granted therein. It follows that TWTC's and CompTel's petitions seeking clarification that AT&T may not "give effect" to the relief granted in the *Forbearance Order* are not in fact requests that the FCC change the "effective date" of October 11, 2007 set forth in the order itself.

Indeed, the ordering clauses of FCC orders often state that an order is "effective" immediately or following Federal Register publication, thus starting the clock for filing appeals and petitions for reconsideration, even though parties are precluded from giving effect to the outcome prescribed in the order until a later date. For example, the ordering clauses in the Commission's order granting in part Qwest's petition for forbearance from UNE obligations in Omaha state that the order became "effective" on September 16, 2006, one day following its release.[9] However, the order also stated that Qwest was required to continue providing UNEs to competitors for six months following the effective date of the order. *See Qwest Omaha Order* ¶ 74. Qwest itself filed a petition for review of the order within the time allotted from the "effective date" of the order even though Qwest was still required to provide UNEs to competitors at that time. This delay in the relief provided by the order was nowhere to be found in the order's ordering clauses.

Similarly, the FCC granted AT&T's petition for forbearance from dominant carrier regulation for its integrated in-region interexchange operations, but that relief took

[9] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistica*l Area, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 114 (2005) ("*Qwest Omaha Order*").

effect only if and when AT&T complied with several conditions.[10] This was so despite the fact that the ordering clauses stated that the order would be effective (with respect to AT&T's forbearance petition) the day after its release. *See id.* ¶ 141.

Second, and perhaps most fundamentally, AT&T's argument contradicts its own interpretation of the Merger Conditions. AT&T concedes, as it must, that it must comply with the price limits and prohibitions on anti-competitive contract terms in the Merger Conditions. *See AT&T Opposition* at 6. But a "fully effective" forbearance order would of course free AT&T entirely from such regulation. Moreover, nothing in the *Forbearance Order*'s ordering clauses states that AT&T may not give effect to the freedom to increase prices or include certain types of provisions in its contracts until the merger conditions expire. This omission only underscores the fact that the "effective date" of the forbearance order is irrelevant to the question at hand.

Third, the language of the Forbearance Condition supports the conclusion that it applies even if the FCC grants AT&T forbearance in an order with an effective date prior to the expiration of the merger conditions. That Condition states that *AT&T* may not *give effect to* forbearance. This restriction is only meaningful after a forbearance order takes effect. If the FCC were to delay the effective date of a forbearance order until the conclusion of the merger conditions, the prohibition against AT&T giving effect to the forbearance order would be irrelevant. It is therefore entirely "credible," indeed eminently logical, for CompTel and TWTC to seek enforcement of the prohibition

[10] *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements et al.,* Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440, ¶ 95 (2007) ("*Interexchange Non-Dominance Order*").

against AT&T giving effect to the *Forbearance Order* without at the same time seeking reconsideration of that order.

III. THE FORBEARANCE ORDER AS WELL AS THE PURPOSE AND TEXT OF THE MERGER CONDITIONS SUPPORT THE TWTC AND COMPTEL PETITIONS FOR DECLARATORY RULING

In its attempt to avoid complying with its obligations under the Merger Conditions, AT&T offers only overblown rhetoric and unreasonable, self-serving interpretations of the purpose and terms of the *Forbearance Order* and the Special Access Merger Conditions themselves.

A. The Terms And Context Of The *Forbearance Order* Support The Conclusion That AT&T May Not Withdraw Its Broadband Business Tariffs

AT&T asserts that the FCC's statement in paragraph two of the *Forbearance Order* that the relief granted therein "does not effect in any way the full force and effect of the merger conditions" is clear on its face and means that those conditions would not be diminished or superseded by the elimination of tariffs. *See AT&T Opposition* at 6. As TWTC explained in its petition, it is equally logical to interpret this statement to mean that the full force and effect of the merger conditions apply *notwithstanding* the relief granted in the *Forbearance Order*. Moreover, the context in which the Commission made this statement confirms that TWTC's interpretation is the correct one. *See TWTC Petition* at 3-4.

To begin with, while Commissioner McDowell voted in favor of the *Forbearance Order*, he clarified in his separate statement that the merger commitments prevent AT&T from giving effect to the relief otherwise available under the *Forbearance Order*. As Commissioner McDowell explained, "Upon the expiration of the voluntary merger conditions agreed to by AT&T as the result of its merger with BellSouth, after December

29, 2010, AT&T will be relieved from existing *tariffing*, price freeze and facilities discontinuance requirements for non-TDM-based business broadband services." *McDowell Statement* at 45. AT&T's only response to Commissioner McDowell's statement is to demean his intelligence, arguing that he was "presumably unaware of the history and context of these merger commitments." *AT&T Opposition* at n.42. This is ridiculous. Commissioner McDowell obviously knew exactly what he was doing and was fully aware of the context and import of his statement.

In fact, given Commissioner McDowell's position, three (a majority) of the Commissioners voted either to deny the AT&T forbearance petition outright (as Commissioners Copps and Adelstein did) or clarified that AT&T could not give effect to the forbearance grant until the expiration of the merger conditions. Therefore, three Commissioners believed that AT&T should comply with tariffing requirements for its broadband services until the merger conditions expired.

The views and intent of commissioners must be accounted for in clarifying the meaning of an order. Indeed, AT&T itself agrees that Commissioners' statements are important guides to the meaning of agency orders.[11] Moreover, courts routinely rely on commissioner statements to determine the meaning of administrative decisions.[12] Given Commissioner McDowell's statement and Commissioner Copps' and Adelstein's

[11] *See id at 7* (relying on AT&T's (incorrect) interpretation of Commissioners Copps and Adelstein's separate statements on the *Merger Order*).

[12] *See Allied Broad, Inc. v. FCC*, 435 F.2d 68, 71 (D.C. Cir. 1970) (concluding that the Commissioner's "statement clearly indicated that CATV would be considered a medium of mass communications…"); *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1110 (D.C. Cir. 1992) (relying on a single dissenting Commissioner's view of the meaning of the majority's order to interpret that order); *Democratic Nat'l Comm. v. FCC*, 717 F.2d 1471, 1479 (D.C. Cir. 1983) (relying on commissioners' concurring statements to interpret an FCC order); *Northeast Broad. v. FCC*, 400 F.2d 749, 760 (D.C. Cir. 1968).

rejection of the petition and their clear preference for tariffing, there can therefore be no question that a binding plurality of the FCC's commissioners voted to maintain tariffs on AT&T's broadband services until 2010.

B. The Merger Conditions Themselves Prohibit AT&T From Withdrawing Its Broadband Business Service Tariffs

AT&T offers a series of unpersuasive arguments in support of its interpretation of the terms of the Merger Conditions in its attempt to show that those obligations are not in any way diminished or superseded by the withdrawal of its tariffs. The more logical and natural reading of the conditions is that they preclude AT&T from withdrawing its tariffs.

First, AT&T argues that the "champions" of the merger conditions, Commissioners Copps and Adelstein, understood the conditions "to impose a price ceiling or limit, rather than an obligation to file or maintain tariffs." *AT&T Opposition* at 7. There is no basis for this assertion in either the text of the Commissioners' separate statements or in basic logic. Commissioner Copps' statement that the FCC reinstituted "price caps" in those areas where AT&T had previously received pricing flexibility means that the FCC effectively reimposed price cap regulation, a system that "operates through the tariff review process."[13] Commissioner Adelstein similarly sought to impose a "price freeze" to ensure that the Commission impose *more effective tariff regulation* on AT&T than had existed prior to the conditions. Moreover, it is also clear that Commissioners Copps and Adelstein believed that tariffs were necessary to prevent the inclusion of anticompetitive terms in AT&T's contracts.

These conclusions comport with Commissioners' Adelstein and Copps' underlying (and correct) convictions that the AT&T and BellSouth merger "would result

[13] *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report & Order, 5 FCC Rcd 6786, ¶ 4 (1990).

in a new company . . . controlling the only choice most companies have for business access services" (*Copps Merger Order Statement* at 169), that such an entity would "use its stranglehold over business access services" (*id.* at 173) and that conditions were therefore necessary to "protect against the loss of competition" caused by the merger. *Adelstein Merger Order Statement* at 178. These are the same convictions that caused these two Commissioners to *vote against AT&T's request that it be relieved of tariff filing obligations.* It is not plausible to assert, as AT&T does, that either Commissioner Copps or Commissioner Adelstein believed that the Special Access Merger Conditions would be just as effective without tariffs, the central mechanism for preventing the abuse of market power in the Communications Act, as with tariffs.

Second, AT&T asserts that enforcing the merger conditions is inconsistent with the purpose of the *Merger Order* (in which, AT&T argues (*see AT&T Opposition* at 16) that the FCC found that "the merger raised no competitive issues with respect to packet-switched and optical broadband services") and the *Forbearance Order* (in which, AT&T asserts (*see id.*) that the FCC concluded that elimination of tariffs "would result in substantial public interest benefits"). This argument misses the point of the Merger Conditions.

Commissioners Copps and Adelstein made very clear in their separate statements in the *Merger Order* that the merger conditions were intended to address a pattern of flawed, baseless FCC decisions to eliminate constraints on AT&T's exercise of market power. Both Commissioners stated that they did not agree with the analysis in the *Merger Order*. Moreover, as Commissioner Copps explained, that flawed analysis was part of a broader pattern of FCC decisions in which the FCC "couldn't act quickly

enough to approve every call to deregulate" but in which the FCC "studiously avoided our obligation to encourage the kind of fair competition necessary to protect consumers in a deregulated world." *Copps Merger Order Statement* at 169. Commissioner Copps went on to state that "[n]owhere is the FCC's folly in de-regulating without ensuring competition more apparent than in the special access market." *Id.* at 173. The special access conditions were therefore designed to address this problem by, among other things, "reinstituting price caps" (and the need for tariffs that those price caps require) and prohibiting anticompetitive provisions in AT&T's special access contracts. *Id.* Commissioner Adelstein agreed, emphasizing that the merger conditions were intended to "try to rectify years of decisions that have undercut competition." *Adelstein Merger Order Statement* at 175.

Of course, both Commissioner Copps and Commissioner Adelstein were well aware that "the FCC's folly in de-regulating without ensuing competition" could well continue after the enactment of the Merger Conditions, and that forbearance was a likely context in which this would be the case. Accordingly, they insisted that AT&T agree "not to use [the] forbearance procedures to evade or frustrate any of the commitments" made in the merger. *Copps Merger Order Statement* at 174.

It is clear therefore that the Forbearance Condition was designed to prevent flawed FCC decisions-making in the forbearance process from undermining the effectiveness of merger conditions that were themselves designed to prevent any further erosion of the regulatory protections against AT&T's abuse of market power. The *Forbearance Order* could not be a more obvious example of flawed decision-making in the forbearance process. As Commissioners Copps and Adelstein explained in their Joint

Statement, the forbearance process is "a risky and messy business" in which "there are no requirements on the parties to be explicit in their requests or detailed in the data they provide."[14] Moreover, the Commissioners stated that the *Forbearance Order* eliminated tariffing requirements for special access services even though "there is substantial data available in this and other proceedings to indicate that the special access market is anything but competitive." *Id.* They therefore voted against the "decision to forbear from rules [most importantly tariffing rules] that provide critical pricing protection." *Id.* at 43.[15] The point here is not to revisit the merits of the *Forbearance Order*, but rather to explain that prohibiting AT&T from giving effect to the *Forbearance Order* is entirely consistent with Commissioners Copps' and Adelstein's purpose in adopting the Forbearance Condition.

Nor is the purported purpose of the *Forbearance Order* controlling here. As mentioned, even AT&T admits that it has no choice but to comply with the price and contract term requirements of the Special Access Conditions. Yet such regulation is flatly inconsistent with the analysis (flawed as it was) upon which the FCC relied to grant

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[14] *Forbearance Order,* Joint Statement of Commissioner Michael J. Copps and Jonathan S. Adelstein, Dissenting, at 42.

[15] It is an illustration of just how "messy" the forbearance process truly in that AT&T and Qwest both filed similar forbearance petitions, but Qwest, which lacks AT&T's political clout, was unable to strong-arm the FCC into granting its petition. Qwest therefore withdrew its petition (to avoid rejection). *See, e.g.,* Kelly Teal, *FCC Shelves Forbearance Petitions at Monthly Meeting*, PhonePlusmag.com, Sept. 12, 2007, *at* http://www.phoneplusmag.com/hotnews/79h12103330.html. The FCC then promptly granted AT&T petition, even though AT&T did not support the petition with any greater demonstration of competition than did Qwest. The only conclusion that can be reached from this divergent result is that AT&T's political power (itself a product of the merger with BellSouth) was the key to the success of its petition.

AT&T non-dominant classification in the *Forbearance Order*.[16] It cannot be, therefore, that the underlying purpose of the *Forbearance Order* determines the question of whether the Merger Conditions apply.

For all of these reasons, the original purpose of the Special Access Merger Conditions must control the analysis of whether they would be diminished or superseded by the elimination of tariff obligations. Properly understood, that purpose was to prevent AT&T from exploiting its dominant position in the market that it derives from its "stranglehold over business access services."

Third, AT&T offers a series of rather strained interpretations of text of the Special Access Merger Conditions in its attempt to show that eliminating tariffs would not diminish or supersede its obligations thereunder. These arguments suffer from obvious and fatal flaws. For example, AT&T repeatedly asserts that there is no requirement in the Special Access Merger Conditions to retain tariffs for the sake of retaining tariffs. *See AT&T Opposition* at 7. But this is not the standard. The standard is whether withdrawing tariffs would "diminish or supersede" AT&T's obligations under the conditions. That issue must be examined in context. The Merger Conditions were imposed at a time when AT&T's special access Ethernet and OCn service offerings were subject to dominant carrier obligations. There was therefore no need for the Commission to establish express, detailed tariff filing obligations in the Merger Conditions. But this does not mean that the elimination of tariff-filing requirements would not diminish AT&T's obligations under the conditions by depriving regulators and competitors of the central mechanism for enforcing price regulations in the Communications Act.

[16] *See Forbearance Order* ¶¶ 23-25 (concluding that competition and other regulated alternatives were sufficient to constrain AT&T's pricing of business broadband services).

In any event, the terms of the conditions themselves demonstrate that the authors viewed tariffs as a central component of the obligations established therein. In fact, given that the original purpose of the Special Access Merger Conditions, described above, must control the analysis, the ill-effects of detariffing such services must be taken into account. As TWTC explained in its petition, "[t]hreats to competition derive not only from *higher tariff rates* but also from *discriminatory tariff rates* that favor affiliated parties as well as other favored customers." *TWTC Petition* at 4. As TWTC also explained at length, absent tariffs, AT&T could engage in an undetected price squeeze by charging itself or favored customers low rates while charging its competitors high rates. *See id.* at 8-9.

Moreover, AT&T's assertions with regard to each of the specific special access conditions are unpersuasive. AT&T argues that the reference in Special Access Condition 2 to TCG's tariffs is merely for the purpose of identifying the price level above which it may not increase its prices. *See AT&T Opposition* at 7. But, as TWTC has explained, this provision can just as easily be read to refer only to services offered in the AT&T/BellSouth territory "pursuant to, or referenced in, TCG Tariff No. 2." *TWTC Petition* at 5. Once the services are no longer offered under this tariff, the condition no longer applies on its face. Indeed, this is the more logical reading given Commissioner Copps' and Commissioner Adelstein's concern that the conditions prevent AT&T from abusing its market power.

AT&T also implies (*AT&T Opposition* at 8) that the FCC should not be concerned that it will no longer be required to file TCG tariffs, because TCG is a CLEC. But the Merger Conditions apply only in the AT&T ILEC territory and Special Access Condition

2 merely ensures that services offered by TCG in AT&T's newly expanded ILEC territory (now including BellSouth) remain subject to rate regulation.

AT&T insists that elimination of tariffs is "irrelevant" to Special Access Condition 3 because that condition does not explicitly refer to tariffs and that TWTC's argument to the contrary is simply an attack on AT&T's trustworthiness (which is of course highly questionable, as Level 3 *et al.* demonstrated in their comments[17]). *See AT&T Opposition* at 8-9. AT&T fails even to address the problem that Condition 3, which prohibits AT&T from providing "any special access offerings" to its wireline affiliates that are not available to unaffiliated entities "on the same terms and conditions," is far more difficult to enforce without tariffs. At the time the merger conditions were adopted, all of AT&T's "special access offerings" were offered pursuant to tariffs and the most effective way to ensure that a dominant firm continues to offer special access "on the same terms and conditions" to unaffiliated parties is via tariffs. This is true regardless of whether the condition expressly refers to tariffs. Indeed, if annual certification were sufficient to constrain an ILEC's market power, the Commission would do away entirely with tariffs, an obviously absurd suggestion.

Special Access Condition 4 clearly states that AT&T may not provide a new "contract tariff service" to its affiliate unless or until it certifies that it provides that same service "pursuant to that contract tariff" to an unaffiliated customer. It is hard to fathom how this requirement would not be diminished or at least superseded by the elimination of "contract tariff[s]." Undeterred, AT&T insists that the Commission must focus on the purpose of this provision, namely that "AT&T could improperly favor its own affiliates

[17] *See* Comments of Level 3 Communications, LLC *et al*., WC Dkt. No. 06-125, at 6-9 (filed Dec. 21, 2007).

over unaffiliated carriers in the provision of special access services." *Id*. at 9. AT&T claims that it can meet this "purpose" without tariffs. But the purpose of this condition itself reveals that the Commission is concerned that AT&T has the incentive, as AT&T admits (*id.* at 9-10), to discriminate in the provision of special access. The most appropriate means of diminishing the risk of discrimination is by requiring tariffs. Absent the tariffs upon which the Condition places express and unambiguous reliance, the AT&T's obligations would be diminished and superseded by a different, less effective means of detecting or deterring discrimination (one that would not include the transparency of contract tariffs).[18]

Special Access Condition 5 explicitly prohibits AT&T from increasing the rates in its tariffs for special access, and Special Access Condition 6, as revised by the reconsideration order, similarly relies expressly on the existence of tariffed rates, and indeed even sets a deadline for AT&T to file "all tariff revisions necessary to effectuate this commitment."[19] AT&T argues that it can comply with these conditions without tariffs (*see AT&T Opposition* at 9-10) but this is not so. AT&T cannot comply with the Condition 5 prohibition against "increasing the rates in its interstate tariffs" if such tariffs no longer exist. Nor can AT&T retain the "tariff revisions necessary to effectuate" Condition 6 if it does not have tariffs on file. In any case, the obvious intent of

[18] In footnote 29, AT&T cites to the FCC reliance on a "bright-line rule" to address discrimination instead of tariffs (*see AT&T Opposition* at n.29), but in fact the rule specifically contemplates the filing of contract tariffs: "Before the price cap LEC provides a contract tariffed service…to one of its long distance affiliates…the price cap LEC certifies to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer." 47 C.F.R. § 69.727(a)(iii).

[19] *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Order on Reconsideration, 22 FCC Rcd 6285, Appendix A at 5 (2007).

Conditions 5 and 6 is to constrain AT&T's market power in the provision of special access, and years of Commission precedent teach that this is more effectively accomplished with tariffs than without. Eliminating the tariffs upon which these conditions expressly rely would therefore diminish the AT&T's obligations and cause them to be superseded by a less effective regime that relies on AT&T's certification alone.

Special Access Condition No. 7 also expressly relies upon the existence of tariffs, since it prohibits AT&T from opposing mediation requests or accelerated docket requests concerning the prices, terms and conditions in its "interstate special access tariffs and pricing flexibility contract." Absent such tariffs and contract tariffs, this condition has no meaning on its face. AT&T proposes to replace this condition with a promise not to oppose mediation or accelerated docket treatment for services *offered under private contracts*. *See AT&T Opposition* at 11. As TWTC explained, AT&T's obligations under this condition will clearly be reduced under its proposed approach because no customer will have a basis for requesting mediation or accelerated docket treatment for a discrimination claim since customers will be unaware of the rates, terms and conditions AT&T offers to other customers under its private contracts. *See TWTC Petition* at 11. At most, AT&T seeks to "supersede" Condition 7 with a new, less viable commitment in which discrimination cannot be detected.

Indeed, by definition, whether AT&T is discriminating against competitors requires an examination of the *relative* prices, terms and conditions offered by AT&T. Relative differences can only be detected by comparing two or more pricing plans or tariffs or the rates received by two or more companies from the same tariff (for example,

different prices set to different volume levels). Without a tariff filing requirement, carriers will have no way to know what terms and conditions other carriers, including AT&T's affiliates, may be receiving and therefore whether they are being discriminated against.[20] Without such knowledge, competitors will not know when or whether an accelerated docket complaint is appropriate. Therefore, the absence of tariffing conditions unquestionably "diminishes" condition seven. By contrast, if tariffs continue to be required, TWTC could view the tariff once it is filed, determine whether its structure or pricing level was discriminatory and file a complaint just days after the tariff is filed or even move to suspend the tariff before it goes into effect. Indeed, AT&T filed just such a complaint against BellSouth's TSP tariff.[21]

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[20] For example, by examining BellSouth's TSP discount plan to determine different prices paid by most carriers versus BellSouth's own affiliate, the FCC determined that the structure of the tariff discriminated in favor of the affiliate. *See AT&T Corp., Complainant, v. BellSouth Telecommunications, Inc., Defendant*, Memorandum Opinion and Order**,** 19 FCC Rcd 23898 (2004) ("*TSP Order*") (Although this FCC order was struck down on appeal, (*see BellSouth Telecoms., v. FCC*, 469 F.3d 1052 (D.C. Cir 2006)) this does not diminish its power in showing how the tariffing process protects against discrimination). In private negotiations, it is entirely possible that AT&T will not provide a wholesale customer with a table of discount percentages depending on the volume provided, but would rather make particularized offers to each carrier depending upon the circumstances. Indeed, this is how Verizon has negotiated with TWTC after it received default forbearance for its broadband services. In such a scenario, it would be impossible for the wholesale customer to know whether the service it was receiving is priced in a discriminatory fashion.

[21] *See TSP Order* ¶ 17 ("On July 1, 2004, AT&T filed the instant Complaint. In brief, AT&T alleges that: (1) the TSP is unlawfully discriminatory, in violation of section 272 of the Act, because it provides volume discounts to BellSouth Long Distance that are neither cost-based nor proportional to the discounts available to BellSouth Long Distance's larger competitors; (2) the TSP is unjust and unreasonable, in violation of section 201(b) of the Act, because it facilitates anticompetitive conduct and non-market-based pricing; and (3) the TSP discriminates unreasonably, in violation of section 202(a) of the Act, because it unreasonably restricts the availability of volume discounts, offers different prices and terms for like services without reasonable justification, and

Special Access Condition No. 8 establishes a prohibition against certain "access service ratio terms," but the prohibition only applies to "any pricing flexibility contract or tariff filed with the Commission." Absent such contract tariffs and tariffs, the condition has no meaning and imposes no obligation on AT&T. AT&T promises now not to include the access service ratios in question in *private* contracts, but that commitment (1) diminishes the effect of Condition 8, because it will be impossible to detect violations of this commitment in private contracts, especially (as seems likely) if they are not made available to interested parties, and (2) supersedes this commitment with a different commitment, one prohibiting inclusion of the offending access service ratios in private contracts instead of tariffs and contract tariffs.

Finally, AT&T concedes (*see AT&T Opposition* at 12) that Special Access Condition 9 requires it to file a tariff, but rather absurdly asserts that the condition can be satisfied by filing and then *withdrawing* the tariff. AT&T offers no evidence that its approach squares with the intent of the Condition 9. Simply because the condition does not say that the tariff may not be withdrawn does not mean that tariff maintenance is not an implicit requirement of the condition. The far more plausible interpretation is that the absence of a statement in the condition that AT&T may withdraw the tariff means that AT&T must retain the tariff until the expiration of the merger commitments. In addition, the FCC could have stated that AT&T would have to simply make an "offer" to available competitors without a MARC, but it did not do so and keyed the requirement directly to the filing (and maintenance) of a tariff.

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unreasonably seeks to improve the competitive position of smaller carriers.") (internal citations omitted).

C. The History Of The Forbearance Merger Condition Proposals Does Not Support AT&T's Position

Apparently recognizing the weakness of its proposed interpretation of the Merger Conditions themselves, AT&T tries to buttress its position with farfetched and incoherent inferences. In particular, AT&T argues that the Forbearance Condition cannot be read to require retention of AT&T's business broadband tariffs because (1) that interpretation would mean that AT&T's broadband business forbearance petition was actually "forestall[ed]," "pre-judg[ed]," and "nullif[ied]" by the merger conditions (*see id.* at 2, 15), and (2) Commissioners Copps and Adelstein decided not to adopt parts of the forbearance condition language proposed by CompTel that would purportedly have more clearly required rejection of AT&T's broadband business forbearance petition. *See id. at* 13-14. None of these arguments has merit.

To begin with, enforcement of the Merger Conditions does not in any sense prevent the FCC from granting AT&T's forbearance petition.[22] Rather, as explained, those conditions merely prevent AT&T giving effect to that grant, including detariffing, until the Merger Conditions expire.

In addition, AT&T's inferential arguments, like their other arguments, ultimately rest on an unsustainable inconsistency. Again, AT&T concedes that certain relief (the

[22] In a letter prior to the adoption of the Order, TWTC argued that AT&T's Petition violated the merger condition not to "seek" any forbearance that would "diminish" or "supersede" its merger obligations. *See* Letter of Thomas Jones, Counsel, TWTC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 06-125, 06-74 (filed Oct. 8, 2007). TWTC believed that AT&T's petition should be dismissed on that basis. The FCC did not agree, and adopted the order anyway. TWTC is not addressing that issue in this proceeding, but merely seeks clarification that AT&T must continue to file tariffs or else the merger commitments would be "diminished" or "superseded." Therefore, in this proceeding, TWTC is only arguing that AT&T must delay the date by which it can give effect to detariffing until the expiration of the merger commitments, not that the FCC must "reject" or "nullify" AT&T's petition.

freedom to increase prices) provided by the *Forbearance Order* may be lawfully delayed by the merger conditions, while arguing that other relief (elimination of tariffs), may not. *See AT&T Opposition* at 6. AT&T provides no explanation as to why Merger Conditions that temporarily prevent AT&T from increasing prices post-forbearance *would not* unlawfully "forestall" or "pre-judge" or "nullify" its forbearance petition, while the conditions which preclude AT&T from detariffing *would* "forestall," "pre-judge," or "nullify" its forbearance petition.

AT&T makes much of the fact that Commissioners Copps and Adelstein decided not to adopt CompTel's proposed language that would have required AT&T to withdraw its petition for forbearance pending at the time. *See id.* at 13. But AT&T's business broadband forbearance petition as filed addressed both interexchange and special access business broadband services. It is entirely plausible that Commissioners Copps and Adelstein did not support withdrawal of the petition because they thought it appropriate to forbear from regulating AT&T's interexchange services. Indeed, both Commissioners voted in favor of granting AT&T conditional forbearance for long distance broadband services eight months after the adoption of the merger conditions.[23]

Nor do other aspects of the history of the Forbearance Condition support the view that the merger conditions permit elimination of broadband business tariffs prior to December 2010. On October 13, 2006, AT&T proposed a set of conditions.[24] The only

[23] *See Interexchange Non-Dominance Order* at 113, Separate Joint Statement of Commissioner Copps and Commissioner Adelstein, Concurring in Part, Dissenting in Part ("We support this relief, with the conditions and commitments included herein, because the Commission must take into account the changing long-distance market.").

[24] *See* Letter of Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T Services, Inc., to Hon. Kevin Martin, Chairman, FCC, WC Dkt. No. 06-74 (filed Oct. 13, 2006).

condition relating to forbearance proposed by AT&T was related to UNE obligations.[25] In response, CompTel argued that this single commitment was too narrow and proposed language which would have barred AT&T from "*giv[ing] force or effect to any present or future grant of forbearance, or any other decision of the Commission or a court, in a manner that in any way reduces, alters, or otherwise affects their duties under the conditions and commitments of this merger*." (emphasis in original).[26] The final version of the condition excluded CompTel's language regarding the impact of non-forbearance decisions as well as the terms relating to action that would "alter or otherwise affect" AT&T's duties under the conditions.

AT&T seems to argue (*see AT&T Opposition* at 14) that these revisions support the inference that Commissioners Copps and Adelstein believed that the Merger Conditions do not preclude elimination of AT&T's broadband business tariffs. But there is no basis for this assertion. It is entirely plausible to conclude that Commissioners Copps and Adelstein viewed the terms "diminish or supersede" as fully sufficient to prevent elimination of tariffs until the expiration of the Merger Conditions. Commissioners Copps and Adelstein likely rejected the term "affect" because they viewed it as unnecessary to ensure retention of tariffing and other key aspects of the merger commitments. Moreover, the portion of CompTel's proposal that Commissioners Copps and Adelstein rejected as too broad (*e.g.*, the bar on giving effect to non-

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[25] *See id.* at 6 ("For thirty months from the Merger Closing Date, AT&T/BellSouth will not seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the 'Act') 47 U.S.C. 160, or any other petition altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.").

[26] CompTel Comments, WC Dkt. No. 06-74, at 19 (filed Oct. 25, 2006).

forbearance decisions that would impact the merger conditions) has no bearing on whether AT&T must retain its services under tariff. Finally, no relevant inference can be drawn from the use of the word "diminishes" instead of "reduces." At least with respect to whether AT&T is prohibited from detariffing its broadband services, there is no practical difference between these terms

IV. CONCLUSION

For the forgoing reasons, the FCC should grant TWTC's and CompTel's petitions for declaratory ruling.

Respectfully submitted,
/s/
Thomas Jones
Jonathan Lechter

Counsel for Time Warner Telecom Inc.,

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